

## Media Ownership Concentration Article.

A number of years ago, I was invited to speak at a competition law conference in Dublin organised by Competition, a specialist journal. In my address I dealt with the issue of media ownership in a democracy.

One of the points I made at time was that a media ownership Bill which was then promised could and should establish statutory guideline limits to prevent excessive concentration of the ownership of our media and I examined the issue of whether such a law could require adherence to the guidelines by requiring those who already exceed the limits to reduce their ownership so as to comply with the norms established for everyone else.

The concept of divestment to comply with competitive norms is well known and accepted in international competition law. It applies to airlines, banks, and other important socio-economic areas.

The importance of diversity in media ownership is not merely a matter of economic competition recognised at Treaty level within the EU; the Charter of Fundamental Rights and Freedoms expressly recognises the value of media pluralism.

It was a little strange, then, to be airily accused by Minister Alex White of “chancing my arm” when I again suggested recently that a law to control concentration of media ownership in Ireland might not only establish guideline limits to apply to future acquisitions, takeovers and mergers, but should contain provisions requiring those who already enjoy a level of concentration of media ownership in excess of what would be permissible for a newcomer to bring their control into line with the general guidelines.

Alex White is a lawyer himself. He knows only too well that the constitutional protections for private property, which he vaguely suggested as a reason why an obligation to require divestment could not be enacted into law, are by no means absolute or an obstacle to such legal change.

Article 43 of the Constitution expressly makes the exercise of property rights open to being regulated in the interests of social justice, and empowers the State to enact laws to limit the exercise of property rights by reference to the “exigencies of the common good”.

And Article 45, which sets out directive principles of social policy for the general guidance of the Oireachtas in the making of laws, expressly mandates our law-makers to prevent the “concentration of ownership” in a few individuals to “the common detriment”.

To attempt to argue, as Alex White seemed to do, that it would be constitutional to legislate to prevent any newcomer to exceed reasonable ownership concentration guidelines by reference to the “common good” and “public detriment”, but somehow unconstitutional to require any existing owner to comply with the same guidelines seems implausible and, not to put a tooth in it, frankly dotty.

To require someone by law to divest himself within a reasonable time-frame of commercial interests in and across our media so as to bring himself into conformity with what the State would impose on any other individual seeking to invest in media ownership is both legally and intuitively sound in principle and in practice.

No-one has suggested that the State confiscate or expropriate the property interest of media owners held in excess of general norms. Such a suggestion would clearly have constitutional implications, especially if it were not accompanied by appropriate compensation. That is a bogus, straw-man argument.

But simply requiring anyone with excessive concentration of media ownership to comply with the requirements of a general law defining what is excessive by directing them to partly reduce their ownership interests in an orderly and reasonable manner, disposing of some of their commercial interests on a commercial basis to others, simply could not be described as a an unjust or invidious infringement of their property rights.

Put bluntly, there is no constitutional obstacle to such a reasonable law. I can imagine no Attorney General advising any Government that such a law would be constitutionally infirm in principle. And I really cannot imagine any lawyer holding ministerial office really and sincerely believing that he could not devise such a constitutional law.

On the contrary, the requirements of constitutional justice seem, if anything, to favour the enactment of such a law so as to prevent an arbitrary and invidious discrimination arising between media ownership incumbents, on the one hand, and new entrants into the market of media ownership, on the other hand.

What we are witnessing is a failure of will peeking out from behind the over-stretched threadbare fabric of the skirts of the Constitution.

Leo Varadkar told the MacGill Summer School three years ago that Ireland could not “benefit from an excessive concentration of media ownership in the hands of one individual or one company...We definitely do not want an Irish Murdoch or Berlusconi and legislation to address this is long overdue.”

Chancing my arm....my foot!